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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

D. H. OVERMYER CO., INC., a New York corporation, D. H. OVERMYER CO., INC., an Ohio corporation, GREEN & WHITE CONSTRUCTION CO., INC., a Delaware corporation

and

THE SEAMAN'S BANK FOR SAVINGS IN THE CITY OF NEW YORK, QUICKWAY EXCAVATORS, INC., NUCLEAR CORPORATION OF AMERICA, M. KRAMER & SONS, INC., THE PEOPLE OF THE STATE OF NEW YORK, and THE STATE TAX COMMISSION, *Petitioners*

v.

RICHARD J. WOODWARD, NED P. CLYDE, JAMES L. SHERARD, RAYMOND LUNDGREN, DOUGLAS C. MOOREHOUSE, and DAVID M. GREER, doing business as Woodward-Clyde-Sherard & Associates, a partnership, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit dated June 9, 1970, affirming a summary judgment entered by the United States District Court for the Northern District of New York, ordering foreclosure of a real estate mortgage.

OPINIONS BELOW

The opinion of the Court of Appeals dated June 9, 1970 is set forth in the Appendix to this Petition (App. 22a). It appears to be unreported at this time. The orders of the District Court are likewise set forth in the Appendix (App. 3a, 11a). They are not reported.

JURISDICTION

The District Court ordered foreclosure and denied a motion of Green & White for leave to intervene on January 23, 1970. Thereafter, on February 20, 1970, the District Court granted a rehearing, and adhered to its decision denying intervention. These are the orders subsequently affirmed on appeal June 9, 1970.

This Court's jurisdiction is invoked under Title 28, U.S. Code § 1254(1). Under date of September 16, 1970, Mr. Justice John M. Harlan enlarged the time for filing this application to and including October 8, 1970.

QUESTIONS PRESENTED

In a suit to foreclose a real estate mortgage, where defendant seeks, directly or by intervention of an affiliated company, to defend by counterclaim arising from the same transaction that generated the mortgage debt, may the Court, conformably with Rules 1 and 13 of the Federal Rules of Civil Procedure, refuse to entertain such counterclaim, even though plaintiffs have successfully resisted service thereon in another court, and grant summary judgment of foreclosure for plaintiffs?

STATUTES AND RULES INVOLVED

New York provisions of the Uniform Commercial Code, § 3-306 and § 3-408, are set forth in the Appendix, together with Rule 13(a) of the Federal Rules of Civil Procedure. (App. 30a-31a)

STATEMENT OF THE CASE

Petitioners, D. H. Overmyer Co., Inc., are affiliated corporations in a national chain of warehouse companies, the Ohio corporation being the parent company and sole stockholder in all the others,[1] as well as in Green & White, its construction subsidiary.

In the course of a national program involving construction of approximately two hundred warehouses, respondents, an engineering partnership (herein called Woodward-Clyde), practicing throughout the United States and in foreign countries, was engaged to perform soil tests and site examinations at numerous locations in many states. The partners are all residents of New Jersey and California.

The actual construction program contracts (including the soil studies by respondents) were made by petitioner Green & White Construction Co., Inc., a Delaware corporation (herein called Green & White), a wholly owned subsidiary of the Overmyer company.

Green & White became insolvent and Overmyer of Ohio assumed all obligations owing to respondent engineers. In so doing, Overmyer was required to execute 13 promissory notes in the total amount of $243,654, and to post as security for payment a second mortgage on the warehouse premises here under foreclosure, owned by Overmyer of New York.

When foreclosure was started, Overmyer sought to defend by having Green & White intervene and show failure of consideration for the mortgage debt. This was denied by the District Court and affirmed on appeal.

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[1] The other petitioners are nominal parties here, being named as defendants below.

REASONS FOR GRANTING THE WRIT

I

The Trial Court Erred in Granting Summary Judgment, Denying Intervention and Preventing Assertion of a Compulsory Counterclaim, Thus Necessitating a Multiplicity of Suits, in Violation of Rules 1 and 13.

This case was resolved on the pleadings alone, in complete disregard of the merits of conflicting claims. By granting summary judgment of foreclosure, the trial court refused to entertain a counterclaim arising out of the identical transaction.

Plaintiff engineers (respondents here) had successfully resisted service in the U.S. District Court for Massachusetts, pleading they were not there subject to service, and that service on two of the six partners was insufficient to bring the partnership into court. When the six partners invoked the powers of the New York District Court to foreclose, it was completely in keeping with Rules 1 and 13, Federal Rules of Civil Procedure, to ask that they respond on a claim arising directly out of the same transaction as the foreclosure. The District Court was fully informed. The most significant reason assigned for rejecting the counterclaim was that it was the subject of the Massachusetts action then pending. While that was the fact when the motion was argued, it was not so a year later when it was denied. The case had been discontinued there by virtue of the dispersal of the six engineers outside of Massachusetts, and their denial of amenability to process in that jurisdiction. By that time they had voluntarily appeared in the New York court, and this was a proper place to assert the related counterclaim. Green & White was the correct party in the first instance to make that claim, and for that purpose sought

to intervene, showing plainly its common ownership with Overmyer and the posting of Overmyer's real estate as security for Green & White's debt. The relationship was fully spelled out.

Green & White's motion to intervene (App. 13a), with complaint annexed, (App. 17a) clearly shows that its claim of professional negligence arose out of the same transaction which gave rise to the mortgage, alleging that due to the professional negligence of the engineers, Green & White became insolvent and called upon its affiliate, Overmyer of Ohio, owned by the same stockholders as Green & White, which then caused Overmyer of New York to execute the mortgage here in issue as security for payments then believed to be due the engineers (App. 19a-20a). Clearly this counterclaim went to the very heart of the plaintiffs' foreclosure action. It should have been heard and decided as part and parcel of the same proceeding. The basic concept of the Federal Rules of Civil Procedure, as expressed in Rule 1, required such attention. Anent these Rules, it says:

> "They shall be construed to secure the just, speedy, and inexpensive determination of every action."

In this context rejection is contrary to Rule 13(a) on compulsory counterclaims, requiring the pleading of such a counterclaim,

> " . . . if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . "

Examination of this motion to intervene, with the proposed complaint attached (App. 14a), clearly sets forth the facts showing the note and mortgage upon which

the foreclosure is based was given in payment for services which turned out to be professionally wanting, and caused great damage. There was a failure of consideration for the note and direct counterclaim for damages. But this plea was rejected on the most hypertechnical reasoning, and summary judgment was granted to foreclose this mortgage on property valued at approximately one million dollars ($1,000,000) (App. 19a).

It appears that the procedure below conflicts directly with this Court's ruling in *Southern Construction Co.* v. *Pickard*, 371 U.S. 57, 60 (1962). The Court of Appeals had reversed a lower court ruling allowing a counterclaim in a suit to recover on a construction contract. In reversing the Court of Appeals, this Court expounded the policy which should have been followed below:

> (p. 60). "The requirement that counterclaims arising out of the same transaction or occurrence as the opposing party's claim 'shall' be stated in the pleadings was designed to prevent multiplicity of actions and to *achieve resolution in a single lawsuit of all disputes arising out of common matters.*" (emphasis supplied).

This rule has been well recognized and applied for the purpose of avoiding multiplicity of actions. *Checker Motor Corp.* v. *Chrysler Corporation*, 39 FRD 37, 38 (S.D.N.Y. 1965); *Lyons* v. *Marrud, Inc.*, 46 FRD 451, 454 (S.D.N.Y. 1968).

Only a super-technical application of the rules would deny this counterclaim on the ground it is "permissive," as the trial court did. 3 Moore on Federal Practice (2d ed. 1967) par. 13.13, p. 33, defines the canon of construction:

> " . . . courts should give the phrase 'transaction or occurrence that is the subject matter' of the suit

> a broad realistic interpretation in the interest of avoiding a multiplicity of suits."

This is the healthy view of procedure applied in *Affiliated Music Enterprises* v. *Sesac, Inc.*, 17 F.R.D. 509 (S.D.N.Y. 1955), where the court said:

> (p. 511) "The motion to dismiss the counterclaim is denied because the counterclaim is a compulsory one arising out of the same transactions and course of dealing as plaintiff's complaint.
>
> * * *
>
> "Rule 13(a) FRCP has been viewed liberally in the interest of avoiding multiplicity of suits and disposing of all claims between the parties which are logically related."

The decision below necessitates a multiplicity of suits and refuses to follow the eminently sound and sensible course of resolving the entire controversy in a single proceeding. It clearly conflicts with this Court's Rules, its policy, and the decision quoted above.

This principle has been fully recognized and applied in the Second Circuit, where refusal to consider counterclaims was reversed on the precise ground here urged— they arose out of the same transaction or occurence. *Lesnik* v. *Public Industrial Corp.*, 144 F. 2d 968, 975 (2nd Cir. 1944). Of course, the counterclaim in the case at bar sounded in contract for damages, an action at law, while the original suit was in equity for foreclosure. The distinction has no bearing here, as the Second Circuit noted in the *Lesnik Case, supra,* speaking of Rule 13(a):

> (p. 975) "This rule is a broadening of former Equity Rule 30 to include 'occurrence' as well as

> 'transaction,' and to apply to all civil actions, not merely to suits in equity.
>
> * * *
>
> "Under this view the counterclaims here may be viewed as arising out of the *occurrence*, and surely out of the transaction, by which Lesnik took the note upon which the complaint was based.
>
> * * *
>
> (p. 976) "Here, had Public Industrials failed to plead its counterclaims attacking Lesnik's acquisition of the note in his suit on it, it ought not to be allowed to raise the matter later. Hence the counterclaim is compulsory, and, therefore, fairly 'ancillary' to the main action."

Avoiding a multiplicity of suits has been long recognized by this Court as a prime objective in judicial administration, and former Equity Rule 30 was so interpreted in *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610 (1926), where the Court said:

> (p. 610) " 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon *their logical relationship.*" (emphasis supplied)

The Ninth Circuit applied the same reasoning in reversal of a trial court ruling dismissing such counterclaims. *Union Paving Co.* v. *Downer Corp.*, 276 F. 2d 468 (9th Cir. 1960).

In the case at bar, the counterclaim was a direct assertion that the very basis of the plaintiff's case was legally unsound. Right or wrong, it should have been considered and resolved under Rule 13(a). Exactly that situation was presented in *H. L. Peterson Co.* v. *Applewhite*, 383 F. 2d 430, 433 (5th Cir. 1967), where

suit on a note was met by a counterclaim of fraud and failure of consideration. The Fifth Circuit held it was a "compulsory" counterclaim, quoting this Court in *Moore* v. *New York Cotton Exchange, supra,* (p. 610), where it was said:

> "So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter . . . "

Unquestionably that analysis applies directly to the case at bar—failure by the plaintiff would automatically establish the counterclaim, and success in the counterclaim would show plaintiff's case was without merit. *Mansion Carpets* v. *Marinoff,* 24 App. Div. 2d 947, 265 N.Y.S. 2d 298 (1965).

In a case closely parallel to ours on the facts, the Second Circuit approved trial court action allowing intervention by a third party to counterclaim where the defense claimed damages for breach of the same contract sued upon. *United States* v. *American Surety Co.,* 142 F. 2d 726, 728 (2d Cir. 1944).

As to the right of Green & White to appear and defend after it had knowledge of the action, this Court so held in *Washington Gaslight Co.* v. *District of Columbia,* 161 U.S. 316 (1896).

> (p. 329) "As a deduction from the recognized right to recover over, it is settled that, where one having such right is sued, the judgment rendered against him is conclusive upon the person liable over, provided notice be given to the latter, and full opportunity be afforded him to defend the action."

That rule should certainly have prompted recognition of Green & White as the party liable over to Over-

myer. On this basis the proffered counterclaim is recognizable as clearly a "compulsory" one, which would be lost if not pleaded under the Rule.

Provisions of the Uniform Commercial Code, McKinney's Consolidated Laws of New York, Vol. 62½, § 3-306, § 3-408 (App. 30a) clearly place the burden of proving failure of consideration on the defendant. 12 Am. Jur. 2d, Bills and Notes, §1187. The decision below singularly deprived petitioners of all opportunity so to defend, and the delayed decision may well enable respondents successfully to plead limitations, as their counsel has promised.

CONCLUSION

This Court should exercise its power of supervision to correct the lower courts' misapplication of Federal Rules of Civil Procedure, by which the lower court denied petitioners all opportunity to defend and counterclaim, requiring a multiplicity of suits, in place of one, to resolve the controversy.

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